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No. 01-881

IN THE
Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP., d/b/a GE CAPITAL; MONTGOMERY WARD CREDIT SERVS., INC., f/k/a MONOGRAM RETAILER CREDIT SERVICES, INC.,
Petitioners,

v.

GARY A. THIESSEN,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the National Association of Manufacturers (NAM) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. WLF and NAM have been unable to obtain the

consent of Counsel for Respondent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the proper scope of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996); *Linder v. Thrifty Oil Co.,* 23 Cal.4th 429 (2000); *Diamond Multimedia Systems v. Superior Ct.,* 19 Cal.4th 1036 (1999), *cert. denied,* 527 U.S. 1003 (2000).

NAM is the nation's largest industrial trade association; it represents 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. NAM has actively supported adoption of class action reform by Congress.

WLF and NAM are concerned by the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of businesses. WLF and NAM believe that the class-certification decision of the Tenth Circuit in this case, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable.

WLF and NAM are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit. Because of their lack of direct economic interests, WLF and NAM believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation and the National Association of Manufacturers respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Amici curiae address the following issues only:

1. Whether, in determining if a case may proceed as a class or collective action, a district court is prohibited from making factual findings on certification issues that overlap with merits issues?

2. Whether, in a private suit seeking damages from a jury for an alleged pattern-or-practice of discrimination, a district court must use the multi-stage trial plan embraced in *Teamsters v. United States*, 431 U.S. 324 (1977), in deciding whether to certify a class?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and National Association of Manufacturers (NAM) are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioners General Electric Capital Corporation ("GE") and Montgomery Ward Credit Services, Inc. seek review of a decision of the U.S. Court of Appeals for the Tenth Circuit that reversed a district court's decision to decertify a putative class action filed by Respondent Gary A. Thiessen. Thiessen alleges that he and similarly situated employees were adversely affected by a pattern or practice of age discrimination employed by GE, in violation of the Age Discrimination in Employment Act (ADEA).

Thiessen was hired in 1968 by Monogram Retail Credit Services, Inc. ("MRCSI," subsequently renamed Mont-

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

gomery Ward Credit Services, Inc.). He held various management positions at MRCSI until 1994, when he was given a series of "special assignments." In February 1996, Thiessen filed charges with the Kansas Human Rights Commission and the Equal Employment Opportunity Commission ("EEOC"), alleging that he had been the victim of age discrimination. He alleged that GE and MRCSI had adopted a "blocker policy," whereby GE and MRCSI sought to eliminate competent, older management employees who were thought to be "blocking" the advancement of younger, more promising employees. Thiessen alleged that he had been denied advancement as a result of the alleged "blocker policy."

In September 1996, Thiessen filed suit under the ADEA in federal district court in Kansas, raising the claims set forth in his EEOC charge. Alleging that "similarly situated" employees had also been injured under Petitioners' pattern or practice of age discrimination, Thiessen requested that the suit be granted "opt-in" class action status, pursuant to 29 U.S.C. § 626(b). In February 1998, the district court provisionally certified the case as a collective action under the ADEA and allowed 22 other GE/MRCSI employees (out of 30 who responded to Thiessen's notice of the action) to opt in. Petition Appendix ("Pet. App.") 98a-125a.

At the conclusion of discovery, Petitioners moved to decertify the class and also moved for summary judgment as to each of the 23 plaintiffs. The district court granted the motion to decertify and granted summary judgment as to Thiessen's individual claims. Pet. App. 52a-97a. The court concluded that the plaintiffs were not "similarly situated for purposes of proceeding as a collective action" because they

had failed to present evidence of a causal link between the alleged "blocker policy" and the challenged employment actions. *Id.* at 70a. The court also determined that "individual issues would predominate at trial," *id.* at 70a-74a; that trial of the claims on a class-wide basis would be unmanageable in light of the heavy demands it would place on the single jury deciding all factual issues, *id.* at 74a-76a; and that individualized consideration of the plaintiffs' claims would be "impossible." *Id.* at 76a. The court also granted summary judgment to Petitioners on Thiessen's individual claims, finding that three of Thiessen's claims were time-barred and that he had failed to introduce sufficient evidence to create an inference that Petitioners' proffered explanation for their actions was pretextual. *Id.* at 76a-96a.

The Tenth Circuit reversed, finding that the district court had erred both in decertifying the class and in granting summary judgment to Petitioners with respect to Thiessen's individual age discrimination claims. *Id.* at 1a-26a. Applying precedent involving class actions filed under Fed.R.Civ.P. 23, the Tenth Circuit held that the district court, in determining that the plaintiffs were not "similarly situated," improperly focused on the "merits of the underlying class action." *Id.* at 16a. The appeals court held that the district court -- by determining that there was no causal link between the alleged "blocker policy" and the challenged employment actions, and thus that the plaintiffs could not be deemed "similarly situated" -- "deprived plaintiffs of their right to have the issues decided by a jury, or at least have the court determine, under summary judgment standards, whether there was sufficient evidence to send to the jury." *Id.* The court held that the plaintiffs' evidence regarding the alleged "blocker policy" was

sufficient to demonstrate that they were "similarly situated" and thus that decertification of the class was an abuse of discretion. *Id.* at 17a-18a.

The appeals court disagreed with the district court's concerns that individual issues would predominate at trial, rendering the case unmanageable. The court said that the district court's analysis was affected by "its failure to recognize that plaintiffs were proceeding under a pattern-or-practice theory." *Id.* at 16a. Relying on this Court's endorsement of multi-stage trial plans in pattern-or-practice cases in *Teamsters v. United States,* 431 U.S. 324 (1977), the appeals court held that the individualized facts relevant to each of the plaintiffs' claims "would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary." *Id.* The court did not address the district court's assertion that, even under a *Teamsters* multi-stage approach, a single jury would be required to make all factual findings with respect to all plaintiffs.

The appeals court also reversed the grant of Petitioners' motion for summary judgment as to Thiessen's individual claims. The court held that it is improper for a district court to consider summary judgment motions regarding stage-two *Teamsters* issues (*i.e.,* whether an individual plaintiff was injured by an alleged pattern or practice of discrimination) before the court has resolved whether such a pattern or practice actually existed. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

This case raises a number of issues of exceptional importance that warrant review by the Court. The Petition amply demonstrates that the decision below raises issues of national concern that recur frequently and that have deeply divided the federal appeals courts.

Underlying each of the issues raised by the Petition are the distortions being imposed on the litigation process by the ever-increasing number of class actions being certified by federal and state courts, in the employment discrimination litigation context and in other areas of the law as well. As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied,* 516 U.S. 1984 (1995). If not wanting to "roll the dice," they settle, often without regard to the merits of the plaintiffs' claims. *Id. See also Castano v. American Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

Class actions do, of course, serve laudable goals, and the distortions discussed above can be an acceptable price to pay for achieving those goals. For example, class actions can promote judicial economy by reducing the number of occasions on which courts will be required to consider the legal consequences of a recurring fact pattern. Moreover:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

But when a putative class action is unlikely to result in significant saving of judicial resources or to provide incentives for those with small claims to vindicate rights they might otherwise abandon, there can be little justification for coercing defendants into settling marginal claims by certifying the class action. The ruling below, if allowed to stand, is likely to result in a significant increase in the number of certified class actions that do not serve any of the purposes for which class actions were created. Review should be granted both to resolve the conflicts between the ruling below and other federal appeals courts rulings, and to correct significant errors by the Tenth Circuit that threaten to undermine the salutary purposes of class and collective action devices.

ARGUMENT

I. A COURT CANNOT ADEQUATELY DETERMINE WHETHER CLASS MEMBERS ARE "SIMILARLY SITUATED" UNLESS IT EXAMINES FACTUAL ISSUES THAT, TO SOME EXTENT, OVERLAP MERITS ISSUES

The ADEA permits an age discrimination suit to proceed as a class action when other employees who wish to opt into the case are "similarly situated" to the plaintiff. Fair Labor Standards Act ("FLSA") § 16(b), 29 U.S.C. § 216(b).[2] Thus, any court asked to certify an ADEA suit as a collective action must examine closely whether the plaintiff is "similarly situated" to those seeking to opt into the suit. Although a collective action under the ADEA is not technically a "class action" covered by Fed.R.Civ.P. 23, most differences between ADEA collective actions and Rule 23 class actions are not substantial,[3] and most courts -- including the court

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[2] 29 U.S.C. § 216(b) provides, in relevant part:

> An action to recover [appropriate legal or equitable relief, including liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.* (Emphasis added.)

Section 216(b) is incorporated into the ADEA by 29 U.S.C. § 626(b).

[3] The principal difference is that similarly situated employees may be joined as parties to an ADEA or FLSA collective action only if they take affirmative steps to join. *See* 29 U.S.C. § 216(b) ("No employee (continued...)

below -- routinely look to Rule 23 case law in determining whether an ADEA or FLSA action meets the "similarly situated" criterion for certification as a collective action.

The district judge initially certified this case as a collective action. However, upon the completion of discovery, he examined the issue a second time in response to Petitioners' motion to decertify the class. He determined:

> [P]laintiffs have failed to come forward with sufficient evidence of a causal link between the blocker policy or plaintiffs' purported blocker status and the challenged employment actions. Without such evidence, the court simply cannot conclude that the plaintiffs are similarly situated for purposes of proceeding as a collective action when, by their own admission, the blocker policy is the only possible connection among the plaintiff group. As such, the court grants defendants' motion to decertify and dismisses the claims of the opt-in plaintiffs.

Pet. App. 70a.

On appeal, the Tenth Circuit did not dispute the district court's finding that plaintiffs had presented insufficient evidence of a link between the blocker policy and the challenged employment actions. Rather, the appeals court

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[3](...continued)
shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Rule 23 permits certification of a class without the assent of absent class members.

reversed the decertification order on the ground that the district court had erred by focusing on factual issues that overlapped with merits issues. Pet. App. 16a. The appeals court held that such factual issues should not be decided in connection with certification motions but rather should be decided by the jury at trial. *Id.*

Petitioners have demonstrated convincingly that the decision below conflicts sharply with other federal appeals court decisions that have encouraged district courts to make findings on class certification issues that overlap with the merits. That conflict is reason enough to grant the Petition.

Moreover, there is little to recommend the rule adopted by the Tenth Circuit. That rule effectively requires certification of *all* pattern-or-practice discrimination claims that are supported by *some* "legitimate evidence,"[4] regardless of whether that evidence would be sufficient to withstand a motion for summary judgment and regardless of whether any of the plaintiffs was actually affected by the alleged pattern or practice. But if none of the plaintiffs was affected by the alleged pattern or practice, it is difficult to comprehend how the plaintiffs could be said to be "similarly situated." Before a district court determines that the plaintiffs *are* "similarly situated," it ought to be permitted to examine all relevant evidence, including any evidence from the defendant that the

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[4] Pet. App. 18a. The appeals court did not attempt to explain how much evidence constitutes "legitimate evidence," nor did it attempt to explain when denial of class certification would ever be permissible (at least with respect to the first phase of proceedings) once "legitimate evidence" to support a pattern or practice allegation has been introduced.

challenged employment actions were unrelated to the alleged pattern or practice.

True, such an examination will require the court to make findings that overlap with merits issues. But while this Court has cautioned against denial of class certification on the grounds that the plaintiff's case is weak on the merits,[5] the Court has never suggested that a trial court should avoid making factual findings on issues relevant to the propriety of class certification simply because those findings would also be relevant at trial to merits issues. Indeed, the Court has repeatedly indicated that the opposite is true. For example, in a decision handed down only four years after *Eisen*, the Court stated:

> Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12 (1978) (quoting 15 Wright, Miller & Cooper, *Federal*

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[5] *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

Practice and Procedure, § 3911 n.45 (1976)). The federal courts "have found opportunities, with increasing frequency, to invoke the merits in support of determinations that class action treatment" is either appropriate or inappropriate. B. McGuire, *Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits,* 168 F.R.D. 366, 383 (1996).

The Tenth Circuit complained that by making factual findings that overlap with merits issues,"the district court essentially deprived plaintiffs of their right to have the issues decided by a jury, or at least have the court determine, under summary judgment standards, whether there was sufficient evidence to send the issue to the jury." Pet. App. 16a. That argument is without merit. There is no Seventh Amendment right to certification of one's class claims; if a district court determines that others with potential claims are not "similarly situated" to the plaintiff, then the plaintiff has no basis for complaining that his class claims were not presented to a jury. Moreover, if certification is denied, each potential class member is nonetheless free to file an individual suit and seek a trial by jury.

Equally implausible is the Tenth Circuit's argument that the district court erred because it "effectively deprived plaintiffs of th[e] procedural advantage" afforded plaintiffs who demonstrate that the defendant has engaged in a pattern or practice of discrimination against a protected group. *Id.*[6]

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[6] Such plaintiffs are entitled to a rebuttable presumption that any adverse employment action suffered by members of the protected class was the product of the pattern or practice. *Teamsters v. United States,*

(continued...)

That argument misperceives the nature of the presumption in pattern-or-practice cases. Several avenues are available to a plaintiff who seeks to prove that he has been the victim of intentional discrimination. Plaintiffs frequently resort to the method outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff establishes a *prima facie* case of discriminatory employment treatment by demonstrating that: (1) he is a member of a protected class; (2) he is qualified for the job sought or hoped to be retained; (3) despite his qualifications, he was rejected (or discharged); and (4) after his rejection (or discharge), the position remained open and the employer continued to seek applications from persons of the plaintiff's qualifications. *Id.* at 802; *see also, St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993).

Teamsters simply represents another method by which a plaintiff can create an inference of discriminatory treatment. Under *Teamsters*, a plaintiff creates such an inference by demonstrating that: (1) the employer has a pattern or practice of discriminating against the group of which the plaintiff is a member; (2) he has suffered an adverse employment decision. *Teamsters,* 431 U.S. at 358-62. Such an inference is created even in the absence of direct evidence that the plaintiff was the victim of discriminatory treatment, because (*Teamsters* explained) it is reasonable to infer that an employer with a pattern or practice of discrimination has acted in accordance with that pattern or practice in connection with any single employment action. *Id.* at 362. Nothing in *Teamsters* suggests that the pattern-or-

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[6](...continued)
431 U.S. 324 362 (1977).

practice method of proof is limited to class actions or collective actions; to the contrary, *Teamsters* itself was not a class action, but rather was a suit brought by the United States against an employer and a union alleged to have engaged in racial discrimination. Thus, while the district judge ruled that Thiessen's claims could not proceed as a collective action, he never indicated that that ruling by itself barred Thiessen from proceeding under a pattern-or-practice method of proof.

The Tenth Circuit's statement that the district court's decertification order "deprived plaintiffs of this procedural advantage" is thus a misinterpretation of what was intended by *Teamsters*. The only "procedural advantage" that Thiessen lost by virtue of the decertification order was the advantage that comes to any plaintiff in a certified class action: the "insurmountable pressure on defendants to settle" certified class actions without regard to the merits of the case. *Castano*, 84 F.3d at 746. *Teamsters* did not intend to confer a procedural advantage of that sort.

The mischief caused by the Tenth Circuit's misinterpretation of *Teamsters* is compounded by the manner in which it disposed of Petitioners' motion for summary judgment on Thiessen's individual claims. The Tenth Circuit reversed the district court's grant of the motion, holding that it is improper to consider summary judgment motions regarding stage-two *Teamsters* issues (*i.e.*, whether an individual plaintiff was injured by an alleged pattern or practice of discrimination) before the court has resolved whether such a pattern or practice actually existed. *Id.* at 20a. That ruling virtually guarantees that the employer will be held hostage to a class certification order and will be forced into a settlement.

Under the Tenth Circuit's ruling, virtually every pattern-or-practice claim will be certified as a class or collective action and permitted to proceed to trial, even when the employer can demonstrate that the initial plaintiff's claim is frivolous (and thus subject to dismissal by means of a summary judgment motion) or wholly unrelated to the alleged pattern or practice. One leading commentator has noted that the tactical advantage gained by plaintiffs from class certification is to a large degree a product of the delays required before a defendant's summary judgment motion will be heard:

> There is an exploitable delay between the certification and summary judgment motions. The class certification increases the defendants' potential liability, leaving them vulnerable to strategic leveraging. The additional time and expense required gives plaintiffs unfair bargaining power in settling meritless claims. This is precisely what a merit-based certification procedure is designed to prevent. Even a small delay can drastically alter the settlement strategy of both parties and pervert the goals of Rule 23. Thus, the use of summary judgment motions in these circumstances will not prevent strategic harms. Allowing the judge to consider the underlying merits of the claim when deciding the certification issue would solve this dilemma.

D. Towns, Note, *Merit-Based Class Action Certification: Old Wine in New Bottles,* 78 Va. L. Rev. 1001, 1031 (1992).

By barring consideration of stage-two *Teamsters* summary judgment motions until after final resolution of stage-one issues, the Tenth Circuit has significantly increased the distortions already present in certified class actions. Such

distortions could be significantly reduced if district courts were permitted, in connection with class certification rulings, to make factual findings on issues that overlap with merits issues.

Review is warranted in this case to consider the Tenth Circuit's ruling -- contrary to rulings from the Fourth, Fifth, and Seventh Circuits -- that in determining whether a case may proceed as a class or collective action, a district court is prohibited from making factual findings on certification issues that overlap with merits issues.

II. THE MULTI-STAGE TRIAL PLAN EMBRACED IN *TEAMSTERS* IS NOT WELL-ADAPTED TO SOLVING "PREDOMINANCE" AND "SUPERIORITY" PROBLEMS INHERENT IN ANY PATTERN-OR-PRACTICE CASE IN WHICH THE PLAINTIFFS SEEK DAMAGES FROM A JURY

Teamsters was decided in an era in which the remedies available to plaintiffs in employment discrimination cases, including pattern-or-practice cases, were largely equitable in nature and the factfinder at trial was generally a judge rather than a jury. More recent federal legislation, particularly the Civil Rights Act of 1991, has altered the landscape considerably. For example, plaintiffs prevailing in Title VII employment discrimination claims are now entitled to seek compensatory and punitive damages. *See* 42 U.S.C. § 1981a(b). In all cases in which such damages are sought, either party may demand a jury trial. 42 U.S.C. § 1981a(c).

Those changes have enormous implications for the feasibility of maintaining pattern-or-practice employment

discrimination claims as class or collective actions. Damage claims are inherently individual in nature; any individual plaintiff's claim for damages is likely to depend far more heavily on issues unique to that plaintiff than on issues common to an entire class. Accordingly, serious questions arise, in any employment discrimination case in which the plaintiff(s) seek damages, whether: (1) the questions of law or fact common to members of the class "predominate" over any questions affecting only individual members; and (2) a class action is "superior" to other available methods for the fair and efficient adjudication of the controversy. If the plaintiff(s) cannot demonstrate predominance and superiority, class action treatment is generally inappropriate in a pattern-or-practice case in which damages are sought, regardless whether the plaintiff is proceeding under Rule 23(b)(3) or under the collective action provision of the ADEA.

As Petitioners have noted, the federal appeals courts have reached starkly conflicting results regarding the effect of damage claims on the feasibility of maintaining pattern-or-practice cases as class or collective actions. The decision below conflicts directly on this issue with decisions from the Fifth and Eleventh Circuits. Review is warranted in order to resolve that conflict.

Amici write separately in order to emphasize the tremendous difficulties being confronted by the business community due to class certification of pattern-or-practice employment discrimination cases in which damage awards are sought. The increased availability of damage awards in such cases has led to a sharp upsurge in class action filings. Class action filings in the federal courts have "dramatically increased" from approximately 30 per year in the decade

preceding adoption of the Civil Rights Act of 1991 to over 125 per year, and the number continues to rise. Charles S. Mishkind and V. Scott Kneese, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases,* 662 PLI/Lit 403, 414 (2001). The potential damage awards in such cases routinely run into the billions of dollars. For all the reasons discussed above, it is small wonder that once a class action is certified or likely to be certified in such cases, the employer virtually always enters into a settlement agreement -- often agreeing to pay sizeable damage awards to the plaintiff class. *See, e.g. Abdallah v. Coca-Cola Co.,* 133 F. Supp. 2d 1364 (N.D.Ga. 2001) (settling pattern-or-practice race discrimination claims for $192 million).

While acknowledging that the presence of claims for damages can add considerable complications to pattern-or-practice class actions, the Tenth Circuit insisted that the *Teamsters* multi-stage trial plan permits courts to certify a class while avoiding predominance and superiority problems. The appeals court said that even if each plaintiff's individual claims had to be tried separately during stage two of a case conducted pursuant to a *Teamsters* trial plan, common issues of fact and law would still predominate during stage one, during which the court would determine whether Petitioners maintained a broadscale pattern or practice of age discrimination. Pet. App. 16a-17a.

The Tenth Circuit's approach is seriously flawed. As other courts have held, it makes little sense to certify a class action unless the court determines that the predominance and superiority requirements are met for the case "as a whole," not simply during a single stage of the case. *See, e.g., Smith v. Texaco, Inc.,* 263 F.3d 394, 409 (5th Cir. 2001). Class

actions are designed to promote judicial economy.[7] If trying all phases of a class action would consume more resources than trying the claims of each plaintiff separately, it makes little sense to certify a class action simply because doing so will save resources at an initial stage of the case. The Texas Supreme Court has rightly derided the rationale underlying such class certification decisions, stating, "We reject this approach of certify now and worry later." *Southwestern Refining Co. v. Bernal,* 22 S.W.3d 425, 435 (Tex. 2000). Plaintiffs, of course, are generally quite happy with that approach; they rightly anticipate that certification will force defendants into settlement mode long before unwieldy portions of a class action come to trial. But courts should not embrace certification as an alleged resource-saving device based solely on the hope that it will coerce more settlements.

Moreover, as Petitioners correctly point out, the Seventh Amendment requires that a single jury decide all issues of fact in a class action. If, as the Tenth Circuit suggested, the individual claims of each plaintiff could well end up being adjudicated "in a series of individual trials" (Pet. App. 16a), then a single jury would need to be empaneled for an inordinate length of time. Given the severe taxing of judicial resources required by any such proceeding, it is difficult to justify a finding that a collective action is

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[7] As noted above, class actions are also designed to facilitate suits by those with meritorious claims who might not otherwise file suit because the small size of their claims would render individual suits economically unfeasible. *Amchem Products,* 521 U.S. at 617. But that rationale is rarely implicated in employment discrimination claims. Due to the potential to recover large damage awards as well as attorney fees, the cost of bringing an individual suit is rarely a deterrent to the filing of meritorious employment discrimination claims.

"superior" to other methods of resolving the plaintiffs' claims. The Tenth Circuit's opinion does not even mention the Seventh Amendment issue. In contrast, conflicting appeals court decisions, such as *Smith v. Texaco,* cited Seventh Amendment concerns as a principal reason for decertifying a class on superiority grounds. *Smith*, 263 F.3d at 413-16. The Court should grant the petition in order to resolve this conflict.

Finally, the Tenth Circuit's determination that certifying a collective action would save judicial resources during stage one of the case (the determination of whether Petitioners maintained a pattern or practice of age discrimination) was based in large measure on its determination that Petitioners should be permitted to raise only a limited number of defenses during stage one. Pet. App. 16a-17a. In particular, the Tenth Circuit decision makes clear that Petitioners would *not* be permitted to argue during stage one that individual employment decisions were not made based on a pattern and practice of age discrimination. *Id.* As Petitioners point out, denying them the right to raise individualized issues at stage one raises serious constitutional concerns. Pet. 23. Yet, if a defendant introduces individualized issues at stage one (as it will surely do if allowed), then any judicial economy derived from certifying the class for purposes of deciding stage one issues will quickly dissipate.[8]

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[8] Moreover, if an employer can show that none of the plaintiffs was subject to the employer's alleged pattern or practice of discrimination, then no plaintiff has standing to maintain a collective action. In the absence of at least one plaintiff with standing, a federal court lacks jurisdiction to make findings regarding the alleged pattern or practice or to issue an injunction against it. Accordingly, an

(continued...)

The Tenth Circuit's unwavering embrace of the multi-stage trial plan outlined in *Teamsters*, despite strong evidence that such plans are inappropriate in damages actions, is seriously flawed. The Tenth Circuit's approach is in direct conflict with that of several other federal appeals courts. The Court should grant review in order to resolve the conflict and to correct the Tenth Circuit's errors.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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[8](...continued)
employer cannot be denied the right to introduce such individualized evidence during stage one of a *Teamsters* multi-stage trial, if for no other purpose than to challenge standing.